



Matthew Sanderson
<msanderson@capdale.com>
>

06/07/2012 02:23 PM

To <thintermister@fec.gov>

cc Trevor Potter <tpotter@capdale.com>

bcc

Subject Request for Audit Hearing and for Response Extension

Mr. Hintermister:

McCain Palin-2008 and McCain-Palin Compliance Fund request an audit hearing to discuss the matters raised in the Draft Final Audit Report.

In addition, the Committees request additional time to respond in writing to the Draft Final Audit Report (and the attached Office of General Counsel memorandum). This written response is currently due on June 11, 2012. More time is needed to prepare a full response to the issues raised. The Committees also need an extension because they no longer retain full-time staff members and must rely on independent contractors who have other responsibilities. The Committees therefore respectfully ask for an extension so that their written response will be due on or before Monday, July 9, 2012.

Please let me know if you have any questions.

Best,

Matt
Matthew T. Sanderson
Caplin & Drysdale, Chartered
(202) 862-5046 (direct)
One Thomas Circle, NW
Washington, DC 20005
msanderson@capdale.com
www.capdale.com/msanderson/

To ensure compliance with requirements imposed by the IRS, we inform you that, unless specifically indicated otherwise, any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any tax-related matter addressed herein. This message is for the use of the intended recipient only. It is from a law firm and may contain information that is privileged and confidential. If you are not the intended recipient any disclosure, copying, future distribution, or use of this communication is prohibited. If you have received this communication in error, please advise us by return e-mail, or if you have received this communication by fax advise us by telephone and delete/destroy the document.



July 7, 2012

VIA ELECTRONIC AND CERTIFIED MAIL

Thomas E. Hintermister
Assistant Staff Director
Audit Division
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: McCain Presidential Committees' Response to the Draft Final Audit Report

Dear Mr. Hintermister:

McCain-Palin 2008, Inc. and McCain-Palin Compliance Fund, Inc. have endeavored to comply strictly with Commission rules. Their success in doing so is demonstrated by the fact that the Audit Division's nearly four-year audit of McCain-Palin 2008, McCain-Palin Compliance Fund, and their seven affiliated joint fundraising committees has identified only two outstanding issues: (1) Press reimbursement calculation methods that the Audit Division concedes did not result in "the General Committee ... receiv[ing] travel reimbursements from the Press that exceeded the maximum allowed by the regulations";¹ and (2) certain 48-Hour Notices that were not filed due to an outside vendor's data-management error and concerned contributions only used for compliance purposes.

This Response focuses its analysis exclusively on the first of these issues—Press reimbursement—in addressing comments by the Audit Division and the Office of General Counsel that were included in the Draft Final Audit Report ("Draft FAR") materials. The 48-Hour Notices were already discussed thoroughly in Section II of the "Response to the Preliminary Audit Report," which was previously submitted to the Commission.²

¹ Fed. Election Comm'n, Preliminary Audit Report at 10 (Sept. 30, 2011).

² Preliminary Audit Report Response of McCain Presidential Committees at 14-15 (Dec. 20, 2011).

I. ANALYSIS

The Press covering Senator John McCain's participation in the 2008 presidential campaign travelled predominantly on an aircraft chartered by the McCain Campaign through a contract with Swift Air, LLC. John McCain 2008 (the "Primary Committee") and McCain-Palin 2008 (the "General Committee") agreed to pay Swift Air \$6,384,000 in exchange for 425.6 total flight hours from June 30th to November 15th.³ The total fee paid by the Primary Committee and the General Committee was fixed, in that \$6,384,000 was still due even if fewer than 425.6 hours were ultimately flown.⁴ This is relevant because the two Committees, in fact, only used 252.1 of the 425.6 contracted flight hours (111.8 hours were used by the Primary Committee, 140.3 hours by the General Committee).

The Primary Committee and the General Committee were legally authorized to seek reimbursement from travelling Press entities for up to 110 percent of the \$6,384,000 fixed-payment total and other travel expenses.⁵ The Audit Division does not allege that any ineligible expenses were billed to the Press for reimbursement.⁶ And significantly, the Audit Division concedes that the Primary Committee and the General Committee collected the proper total from the Press:

The Audit staff agrees that when using the *total* Swift Air LLC contract amount for both the primary and general election periods ... the General Committee did not receive travel reimbursement from the Press that exceeded the maximum allowed by the regulations.⁷

The total amount billed and received by the Primary Committee and the General Committee was, by the Audit Division's statement, a legally proper amount. Despite the Audit Division's puzzling insistence on clinging to the term "overbilling," the Division is, at bottom, only arguing that the two Committees should have better "match[ed] the cost of the campaign to the proper election."⁸ Put differently, the Audit Division thinks that, although the two Committees together collected the proper total from the Press, the General Committee received too much of the total and the Primary Committee received too little.⁹

³ The contract permitted a maximum number of 22.4 flight hours flown in a week. If the maximum weekly hours were not flown, the leftover hours "rolled over" for use in subsequent weeks. If the contracted 22.4 weekly flight hours were exceeded and no "rolled over" hours were available, Swift Air charged \$15,000 per additional hour. The maximum weekly flight hours were never exceeded.

⁴ The fee excluded aircraft reconfiguration costs and variable costs (e.g. fuel, baggage fees). Reconfiguration costs and variable costs are not at issue in the Draft FAR, so they are not discussed in this Response. See Fed. Election Comm'n, Preliminary Audit Report at 9 (Sept. 30, 2011) ("The General Committee correctly reimbursed the Primary Committee \$390,000 ... for these aircraft configuration costs.").

⁵ See 11 C.F.R. § 9004.6.

⁶ 11 C.F.R. § 9004.6(a)(1).

⁷ Fed. Election Comm'n, Preliminary Audit Report at 10 (Sept. 30, 2011) (emphasis in original).

⁸ Fed. Election Comm'n, Preliminary Audit Report at 13 (Sept. 30, 2011).

⁹ Fed. Election Comm'n, Preliminary Audit Report at 13 (Sept. 30, 2011) ("The General Committee received reimbursements from the Press for campaign travel that were above the maximum amount billable to the Press. The Primary Committee appears to have billed an amount that was less than its cost.").

The General Committee, which is named in the Draft FAR, does not dispute that Press reimbursements could be rebalanced between the two Committees, now with the benefit of hindsight. The General Committee, however, argues that: (A) the Primary Committee and the General Committee used a reasonable process in the first instance to predict the eventual, proper allocation of Press reimbursements between the Committees; and (B) to the extent a misallocation of Press reimbursements between the two Committees still exists, it may correct the imbalance through a payment to the Primary Committee.

A. The Primary Committee and the General Committee Used a Reasonable Process to Predict the Eventual, Proper Allocation of Press Reimbursements between the General Committee and the Primary Committee

Commission rules require an authorized committee seeking reimbursement from Press entities to present an itemized invoice within 60 days of a campaign trip or event.¹⁰ The invoice must reasonably estimate a Press entity's pro rata share for the air transportation of "each segment of the trip," which is calculated by "dividing the total actual cost of the transportation and services provided by the total number of individuals to whom such transportation and services are made available."¹¹

A travel segment's "total actual cost of the transportation" is comprised of both variable and fixed expenses. Variable expenses, such as fuel, catering, passenger taxes, and ground handling fees, are easily attributed to a particular travel segment since they are that same segment's direct costs. Fixed expenses are different. They are not the result of any particular travel segment and would exist even if a travel segment did not occur. What is the proper method for assigning a portion of a fixed cost to a particular travel segment?

The Commission has never issued a rule or express guidance that specifically answers this question, as was acknowledged in the Draft FAR materials: "neither the regulations itself, nor its Explanation and Justification provide a formula for calculating the actual cost of air travel on a chartered airplane used by two committees in two different elections."¹² To calculate the fixed-expense share of a travel segment's "total actual cost of the transportation," then, one must devise a reasonable method to assign some portion of the overall fixed cost to that single travel segment.

¹⁰ 11 C.F.R. § 9004.6(b)(3). *See also* 52 Fed. Reg. at 20886 (June 3, 1987) (stating that the rules permit an estimate of a media entity's costs because it "eases the burden of accounting precisely for such costs in the heat of the campaign. In addition, this allowance permits reimbursements received from some media organizations to compensate for those that do not pay in full.").

¹¹ 11 C.F.R. § 9004.6(b)(2)-(3).

¹² Fed. Election Comm'n, Off. of General Counsel Memo. to Thomas Hintermister at 4 (Apr. 11, 2012). *See also* Fed. Election Comm'n, Off. of General Counsel Memo. to Thomas Hintermister at 5 (Apr. 11, 2012) ("The regulatory history provides no guidance about how to determine the 'actual cost' in a case like this one, where a candidate's primary and general committees shared a contract for use of the same leased *airplane*.") (emphasis in original).

Here, the Primary Committee and the General Committee presented itemized invoices that, as required, listed a reasonable estimate of each Press entity's pro rata share for air transportation, calculated by dividing the "total actual cost of the transportation" by the total number of individuals to whom the transportation was made available. Variable costs were easily attributed to each travel segment. To determine each travel segment's "total actual cost of the transportation," though, the two Committees still needed to devise a method to assign a portion of their fixed costs to each travel segment.

This was not easily done in advance with the two Committees' largest fixed transportation-related cost, the \$6,384,000 fee for 425.6 flight hours paid to Swift Air. (Again, this \$6,384,000 fee was a fixed expense, because it was still due in full even if fewer than the maximum 425.6 hours were ultimately flown.) The Committees knew the total fee (\$6,384,000), the total number of flight hours to which they were entitled (425.6 hours), and, therefore, the baseline hourly rate ($\$6,384,000 / 425.6 = \$15,000/\text{flight hour}$). But the final hourly rate for the Swift Air contract could be calculated only at the end of the contract, when the Committees would know exactly how many flight hours over which to spread the \$6,384,000 fixed fee. While an hourly rate for a travel segment could be predicted, the ultimate hourly rate for that travel segment would fluctuate based on subsequent use or disuse of the plane. For example, the Press could be billed a pro rata share using a \$15,000 per-hour estimate for a July travel segment, but the ultimate hourly rate for that segment would go up if plane use was less than anticipated in August through November, or go down if the plane was flown more than expected in the post-July period. The Committees' calculations were therefore not hampered by "the fast pace of the election campaign," as the Audit Division surmised.¹³ The Committees could not "calculate" here. At best, they could predict the proper hourly rate for a travel segment, knowing that the actual hourly rate would, in the end, depend on future, unknowable events.¹⁴

Facing this situation without the benefit of Commission rules or express guidance, the two Committees could have arbitrarily applied a calculation method or an hourly rate. Instead, the Committees undertook an effort to continually adjust each new travel segment's hourly costs based on the evolving total of estimated hours to be flown under the Swift Air contract.¹⁵ Press reimbursement billings were then sent out and collected using these estimated hourly costs. Realizing that the Swift Air contract straddled the primary- and general-election periods, the two Committees fully anticipated that they could need to later "rebalance" the Press reimbursements between them when the actual hourly rates for all travel segments became known (and knowable) after the 2008 election.

¹³ Fed. Election Comm'n, Preliminary Audit Report at 10 (Sept. 30, 2011).

¹⁴ Because the actual hours flown were far less than the hours to which the Campaign was "entitled" by the contract (252.1 hrs v. 425.6 hrs), the actual per hour cost was much greater (\$25,208 per hour using the Campaign's methodology and \$27,350 per hour using the Audit Division's methodology) than the per hour cost envisioned by the contract ($\$6,384,000 / 425.6 \text{ hours} = \$15,000 \text{ per hour}$).

¹⁵ As the Audit Division noted, "The General Committee ... relied on adjusting the per hour billing rates on a segment-by-segment basis due to using fewer flight hours than available in the Swift Air contract." Fed. Election Comm'n, Preliminary Audit Report at 10 (Sept. 30, 2011).

The Audit Division acknowledges that the Committees' method for predicting the proper allocation of Press reimbursements between the General Committee and the Primary Committee "reflect[s] the comparative actual use of the aircraft between the Primary ... and General Committees..."¹⁶ The Audit Division nonetheless advocates a new, never-before-announced technique for calculating a travel segment's hourly rate, and by extension, the proper allocation of Press reimbursements: divide each weekly installment of the \$6,384,000 Swift Air payment "by the actual weekly hours flown during the general election period..."¹⁷

The Audit Division's method is conveniently simple. But this simplicity is wrought by ignoring important realities about the Swift Air contract. For one, the Swift Air contract was jointly held by the Primary Committee and the General Committee. It spanned four months, straddling the divide between primary- and general-election periods. The Committees and Swift Air intended this exact structure. A four-month contract held by two entities is manifestly different than a two-month contract held by one. The Audit Division, however, wants to now artificially bisect the Swift Air contract without even considering whether the parties would have structured two separate two-month contracts another way. For instance, the amount and frequency of the weekly installment payments might have been different, and the costs certainly would have been greater since a key factor in the cost of securing a dedicated aircraft is the lease's duration.¹⁸ The Audit Division cannot disregard a contract's fundamental elements without its analysis spinning into the realm of fiction.

The Audit Division also ignores the fact that the Swift Air transaction was a fixed \$6,384,000 fee in exchange for 425.6 flight hours. The Committees were required to pay "a total of" of \$6,384,000 in exchange for "425.6 hours over the Term" of the contract, which lasted until November 15, 2008.¹⁹ The total payment and the total hours were divided into equal weekly portions as a scheduling mechanism, but a particular week's payment was *not* in exchange for that week's flight hours, as the Audit Division supposes. General contract law principles,²⁰ and

¹⁶ Fed. Election Comm'n, Preliminary Audit Report at 13 (Sept. 30, 2011). See also Fed. Election Comm'n, Off. of General Counsel Memo. to Thomas Hittermister at 4 (Apr. 11, 2012) (remarking that the General Committee's "method may accurately reflect the comparative actual use of the aircraft").

¹⁷ Fed. Election Comm'n, Preliminary Audit Report at 10 (Sept. 30, 2011).

¹⁸ Regardless of whether the contract is for two months or four months, the aircraft operator/owner is required to place the aircraft through Federal Aviation Administration inspection and thereby remove the aircraft from regular commercial service. The cost of setup and servicing the aircraft for the inspection is relatively static. This allows the lessor of the aircraft to factor that cost throughout the duration of the contract adding to the weekly operating fee. Timing for the complex reconfiguration and then its return to an original state after use are also factors in determining the time the aircraft would be out of service for other commercial rentals. Therefore, the contract would naturally be cheaper based on the longer duration. Several outside experts on aircraft lease pricing confirmed this conclusion, that a four-month lease would be 5 percent to 20 percent less expensive than a two-month lease. The statements of those experts can be provided to the Commission upon request.

¹⁹ Swift Air, LLC Charter Agreement at Attach. A to Cover Sheet at 1 (May 30, 2008).

²⁰ 15 Williston on Contracts § 45:4 (4th ed.). See also 15 Williston on Contracts § 45:3 (4th ed.) ("It may be assumed that if the promises constitute a single contract, there is a general dependency between all the promises on one side and all the promises on the other. This means that all the promised performances on both sides must be regarded as the agreed exchange for each other.")

Arizona law,²¹ which governed the Swift Air transaction, presume that a contract is not divisible in this manner unless divisibility is the contracting parties' unambiguous intent. And the intent of the Committees and Swift Air, as expressed through the lease's structure and plain language, was clear:

- If the Committees breached or cancelled the lease, they were required to pay "all past charges for *actual hours flown* and related expenses to the date of termination."²² The portion of the total 425.6 hours that had been used, not the number of weeks that had passed, served as the basis for calculating the breach or cancellation payment. This is consistent with a \$6.38-million-for-425.6-hours agreement rather than a contract divisible into 19 weekly segments.
- The contract is for a term of months, and not a term of weeks.²³
- The contract featured no maximum or minimum number of weekly flight hours. The Committees would have paid a fee to compensate Swift Air for employee overtime and other costs if weekly usage exceeded 22.4 hours. The Audit Division misreads this provision to mean that Swift Air "limited the services to be provided on a weekly basis to a maximum of 22.4 of flight hours."²⁴ This interpretation is plainly incorrect. That same contractual provision specifically declares: "[t]here shall be no maximum amount of hours allowed." The Committees were also permitted to, without penalty, "roll ... unused hours over to the next week or weeks." In fact, the contract expresses relative indifference as to the number of hours flown in a week, "so long as by the end of the Term, Charterer has paid for at least 425 hours of flying."²⁵ Thus, the flight time to which the Committees were entitled was nowhere limited on a weekly basis. Rather, the structure contemplated the hours over the agreement's entire term. This indifference to weekly usage undermines the Audit Division's claim that a weekly fixed payment was actually in exchange for that week's flight hours.
- The Committees and Swift Air anticipated that flight hours would increase as the 2008 general election neared. If the contracting parties had intended one week's payment to be in exchange for one week's flight hours, then, the payments would have been in graduated amounts so that the hourly rate remained roughly constant as usage also increased. Instead, the payments were divided equally, demonstrating that the parties intended the weekly payments and the weekly hours simply as a timetable.

Dividing a week's installment payment by the week's actual flight hours therefore does not reflect what a travel segment's hourly rate and "total actual cost" were. Yet the Audit Division does that very thing, presumably to simplify the hourly rate calculations since one uses only a week's actual flight hours rather than waiting until the end of the contract to determine how

²¹ See, e.g., Olliver/Pilcher Ins., Inc. v. Daniels, 148 Ariz. 530, 533, 715 P.2d 1218, 1221 (1986) ("Where the severability of the agreement is not evident from the contract itself, the court cannot create a new agreement for the parties to uphold the contract.").

²² Swift Air, LLC Charter Agreement at Attach. A to Cover Sheet at 8, 15 (May 30, 2008) (emphasis added).

²³ Swift Air, LLC Charter Agreement at Attach. A to Cover Sheet at 2 (May 30, 2008).

²⁴ Fed. Election Comm'n, Draft Final Audit Report at 18 (May 23, 2012).

²⁵ Swift Air, LLC Charter Agreement at Attach. A to Cover Sheet at 1 (May 30, 2008).

many actual flight hours over which to spread the \$6,384,000 fixed fee.²⁶ Simplicity is indeed attractive. It interferes with accurately calculating each travel segment's "total actual cost" here, though.

The Committees' calculation method for a travel segment's hourly rate, on the other hand, does not rely on counterfactuals. It recognizes the Swift Air contract as it is, and in doing so, is more consistent with the "benefit derived" principle, with Commission audit precedent, and with Generally Accepted Accounting Principles. The Primary Committee and the General Committee therefore used a reasonable process to predict the eventual, proper allocation of Press reimbursements between the Committees.

1. The Committees' Calculation Method is More Consistent with the "Benefit Derived" Principle

The Committees' calculation method to determine a travel segment's hourly rate coheres with the "benefit derived" principle. The Commission has favored the concept that shared expenses between committees should, unless otherwise specified, be allocated "according to the benefit reasonably expected to be derived."²⁷ For example, to allocate shared expenses between primary-election and general-election presidential committees that are both publicly funded, the Commission's rules state:

Any expenditure for goods or services that are *used* for the primary election campaign ... shall be attributed to the [primary-election spending] limits set forth at 11 CFR 9035.1. Any expenditure for goods or services that are *used* for the general election campaign ... shall be attributed to the [general-election spending] limits set forth at 11 CFR 110.8(a)(2)...²⁸

Usage is central to allocation.²⁹ And it is here as well because a committee derives benefit from an aircraft only when it "uses" an aircraft.³⁰

²⁶ Fed. Election Comm'n, Preliminary Audit Report at 10 (Sept. 30, 2011) (stating that under the Audit Division's method "the actual flight hours are known soon after flights occur...")

²⁷ See, e.g., 11 C.F.R. § 106.1(a)(1). See also Fed. Election Comm'n, Report of the Audit Division on Bush-Cheney '04, Inc. and the Bush-Cheney '04 Compliance Committee, Inc., Statement by Mason and Von Spakovsky 2 (2007) ("The basic principle behind two entities sharing the cost of a mutually beneficial, single communication is express in 11 CFR § 106.1, which states that '[e]xpenditures, including in-kind contributions, independent expenditures, and coordinated expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived."); Fed. Election Comm'n, Report of the Audit Division on Bush-Cheney '04, Inc. and the Bush-Cheney '04 Compliance Committee, Inc., Statement of Weintraub 3 (2007) ("The only justification permitting cost-splitting between Federal candidate and the party is that other candidates in the party are going to benefit from the generic reference to the party.").

²⁸ 11 C.F.R. § 9034.4(e)(1) (emphasis added).

²⁹ See 60 Fed. Reg. at 31,867 (June 16, 1995) (stating that the Rules in 9034.4(e) are bright-line rules meant to "give committees clear guidance as to which expenses will be attributed to the primary election and which to the general election.").

As mentioned, the Committees undertook an effort to determine how much of the fixed \$6.38 million payment to Swift Air each Committee was “using” on a rolling basis by continually adjusting each new travel segment’s hourly costs based on the evolving total of estimated hours to be flown under the Swift Air contract.³¹

Importantly, the Audit Division concedes that the Committees’ method for predicting the proper allocation of Press reimbursements between the General Committee and the Primary Committee “reflect[s] the comparative actual use of the aircraft between the Primary ... and General Committees....”³² The Office of General Counsel seems to agree.³³ Because measuring “use” of an aircraft is the method to determine “benefit derived,” the Audit Division and Office of General Counsel recognize that the Committees’ method allocated the Swift Air aircraft costs (and resulting Press reimbursements) according to the benefit reasonably expected to be derived.

The Audit Division advocates an abandonment of the “benefit derived” principle, though. The Office of General Counsel concludes: “[t]he auditors determined that the actual cost was the amount paid by the General Committee to Swift Air...”³⁴ The Office then restates the correct standard— “travel costs are attributed based on when travel occurs”—but somehow fails to point out that the Audit Division is ignoring aircraft usage altogether and only focusing on the timing of *payments*. Under the Division’s preferred method, the final 10 weeks of the 19-week contract occurred during the general-election period, and the final 10 weekly payments are therefore, by that fact alone, the General Committee’s “share” of the Swift Air fixed fee and resulting Press reimbursements.³⁵ Use is irrelevant. “Actual cost” equals actual payment *per se*. Allocation is determined solely by how committees choose to divide a shared expense. This approach meaningfully departs from past Commission practice. The Audit Division would commit the Commission to deferring entirely to political committees’ chosen allocations. Assume, for instance, the Committees had front-loaded the weekly payments so that two-thirds of the \$6.83

³⁰ See 11 C.F.R. § 9034.4(e)(7) (stating that travel expenses “shall be attributed according to when the travel occurs.”).

³¹ As the Audit Division noted, “The General Committee ... relied on adjusting the per hour billing rates on a segment-by-segment basis due to using fewer flight hours than available in the Swift Air contract.” Fed. Election Comm’n, Preliminary Audit Report at 10 (Sept. 30, 2011).

³² Fed. Election Comm’n, Preliminary Audit Report at 13 (Sept. 30, 2011).

³³ See also Fed. Election Comm’n, Off. of General Counsel Memo. to Thomas Hintermister at 4 (Apr. 11, 2012) (remarking that the General Committee’s “method may accurately reflect the comparative actual use of the aircraft between the two committees.”).

³⁴ Fed. Election Comm’n, Off. of General Counsel Memo. to Thomas Hintermister at 5 (Apr. 11, 2012).

³⁵ Fed. Election Comm’n, Draft Final Audit Report at 17 (May 23, 2012) (“The Audit staff notes that the only portion of the Swift Air contract for which the General Committee was responsible was the final ten weeks. The General Committee seemed to have understood that it was liable for the portion of the contract beginning in the contract’s tenth week because that is how the contract obligation was paid... The Audit staff necessarily focused on the fixed cost incurred and paid during the general election period.”). See also Fed. Election Comm’n, Off. of General Counsel Memo. to Thomas Hintermister at 5 (Apr. 11, 2012) (“The Audit staff’s calculation is appropriate because the cost of the Swift Air contract paid for and used by both the primary and general campaigns should be divided based on the amount each committee actually paid...”).

million total was paid in the first nine weeks. If the Audit Division applied its approach to this hypothetical arrangement, the General Committee's "share" would be just one-third, regardless of the General Committee's comparative use of the aircraft because "the actual cost [to the General Committee] was the amount paid by the General Committee to Swift Air." One might think of other potential scenarios. For example, assume that the Swift Air contract payment schedule and amounts were left as-is, but the Primary Committee used only one hour of flight time. The Audit Division would still permit the Primary Committee to defray over \$3 million of the Swift Air payment because the Primary Committee's actual cost "was the amount paid ... to Swift Air." These absurd results, which would permit a committee to subsidize another's activities, show that while the timing of travel is relevant to reaching a proper allocation in this instance, the timing of payments is not. The "benefit derived" principle is a more accurate allocation approach, and the Audit Division should not have discarded it.

Unlike the Audit Division, the two Committees used a process that was consistent with the "benefit derived" principle to predict the eventual, proper allocation of Press reimbursements. That process was therefore reasonable.

2. The Committees' Calculation Method is More Consistent with Audit Precedent from the Commission.

Though the Committees could not look to a Commission rule or express announcement, they structured their calculation method for determining a travel segment's hourly rate to match Commission precedent found in previous audits. That precedent is embodied in this instructive statement from the Dole-Kemp Final Audit Report, which discusses the proper method for prospectively estimating the hourly cost of a fixed-rate contract:

The contracts for these aircraft contained a fixed price and specified the maximum number of hours that could be flown at that price. This required [Dole-Kemp] to estimate not only the variable costs (such as fuel, landing fees, catering, etc.) related to operating the aircraft, but also estimate the total number of hours to be flown by each aircraft. These estimates were revised several times during the campaign. The estimated hourly rate used by [Dole-Kemp] increased as the campaign progressed and then dropped slightly prior to the campaign's conclusion. The Audit staff determined the hourly rate for each aircraft by accumulating all operating costs and dividing that total by the actual number of hours flown by each aircraft. That calculation resulted in a significantly lower average hourly cost for the aircraft used by Senator Dole and Secretary Kemp than used by [Dole-Kemp] to bill the Press and Secret Service.³⁶

The Dole-Kemp Audit staff's methodology for determining a travel segment's hourly rate for a fixed-rate contract was to divide the total amount of payments made under the aircraft lease by the total number of actual flight hours.

³⁶ Fed. Election Comm'n, Final Audit Report on Dole for President Committee, et al. at 2 (2007) (emphasis added).

The Primary Committee and the General Committee assigned a portion of their \$6,384,000 fixed Swift Air payment to each travel segment using the methods employed by the Dole-Kemp Audit staff. They initially undertook an effort to continually adjust each new travel segment's hourly costs based on the evolving total of estimated hours to be flown under the Swift Air contract. Press reimbursement billings were then sent out and collected using these estimated hourly costs, realizing that the actual rate would differ from the estimate when the actual hourly rates for all travel segments became known (and knowable) after the 2008 election.

The Audit Division rejects the Committees' method because "only those costs attributable to the General Committee should be used in determining the travel cost the General Committee may bill to the Press"³⁷ and because "the General Committee should recognize only those transportation costs from September 1, 2008 through November 4, 2008 in the calculation for billing the Press."³⁸ The Audit Division is only setting up "straw men" here so that it can knock them down. The Committees do not disagree with the Audit Division's truisms—certainly only Press reimbursements for general-election travel should be billed and kept by the General Committee. The real issues here are how should the Committees have predicted the amount of "those costs attributable to the General Committee"? And what was the proper method for prospectively calculating the "transportation costs from September 1, 2008 through November 4, 2008"? The Committees' point is that they used the Dole-Kemp method to calculate in advance each travel segment's hourly rate, and thereby used a reasonable method to predict the amount of Swift Air-related fixed "costs [that would be] attributable to the General Committee."

The Audit Division also cites the Dole-Kemp Audit, but they tacitly suggest that the Dole-Kemp Audit prevents the Division from recognizing that the Swift Air contract extended back into the primary-election period. This is not the case. The Dole-Kemp Audit did indeed deal only with general-election activity, but that was because it was examining a general-election-only aircraft lease.³⁹ The Dole-Kemp Audit's scope was limited by the underlying facts, not by any legal considerations. The Dole-Kemp Audit should therefore not be seen as precedent that the Audit Division may not recognize that the Swift Air contract extended back into the primary-election period. (Again, the Dole-Kemp Audit is cited by the General Committee for

³⁷ Fed. Election Comm'n, Preliminary Audit Report at 10 (Sept. 30, 2011).

³⁸ Fed. Election Comm'n, Preliminary Audit Report at 12 (Sept. 30, 2011).

³⁹ Based on research of the news media from that time period and the Dole for President Committee reports filed with the Commission, it seems that the Dole Primary Committee had run out of room to spend money on normal operating expenses by May 1996, and therefore would not have had the opportunity, as our Campaign did, Bush-Cheney 2000 did, and Kerry-Edwards 2004 did, to sign a contract for and implement reconfiguration costs related to a large air charter for a period of time that crosses the Primary/General periods. Research from the Commission reports shows that the Dole campaign's main air charter vendor was named "AV Atlantic." While we found millions of dollars in expenditures to that firm in September and October 1996, we could find no payments in June 1996 and only one payment to the firm in July 1996 during the end of the primary-election period. It would seem on its face, then, that the Dole Campaign's arrangement with its air charter vendor was vastly different than the type of contract setup the McCain Campaign used. We also note that a *New York Times* article during June 1996 validates the conclusion that the Dole Primary Committee did not have sufficient funds available to enter into the same type of agreement as our Campaign did. *New York Times*, "Democrats Charge Dole Violated Rules on Spending," 6/12/96 ("At the end of April, his campaign reported having spent all but \$177,000 of that sum...").

the proposition that the proper methodology here is to divide the total amount of payments made under an aircraft lease by the total number of actual flight hours.)

Commission precedent is also valuable here. While only general-election committees are subject to mandatory audit,⁴⁰ the Audit Division has conducted limited inquiries into primary-election committees concerning jointly held assets and other items. For example, the Kerry-Edwards 2004 and Bush-Cheney 2000 campaigns held air charter leases that, like the Swift Air contract, straddled the primary- and general-election periods.

The Kerry-Edwards 2004 Final Audit Report states that the campaign leased an aircraft for a period of seven months (April to November 2004).⁴¹ This time frame clearly demonstrates a contract that crossed election periods and therefore is also potentially a reasonable comparison to the Committees' circumstance if the Audit records do indeed show a similar contract and payment structure. Additionally, the Kerry-Edwards 2004 air charter lease allowed unused flying hours to be "banked" each month and moved forward, as needed, without changing the overall cost of the contract. A total of 10.4 hours were banked from the Kerry-Edwards 2004 primary-election committee and used by their general-election committee instead. According to the post-election Final Audit Report, the general-election committee owed the primary-election committee a total of \$205,067 for these banked and transferred hours.⁴² The Audit Division claims that the "repayment of banked hours was unrelated to press billing in Kerry-Edwards 2004."⁴³ This seems unlikely. While Press reimbursement is not specifically mentioned in the Kerry-Edwards 2004 Final Audit Report, if unused "primary" banked hours were later used by their general-election committee and a reimbursement from the general committee to the primary committee was required after the fact to pay for those hours, there must also have been a misallocation of deposited offsets to those expenditures from the Press by both committees. Press travel reimbursements could not have been properly reconciled by the Kerry-Edwards general committee if the Audit Division did not make them account for the 10.4 primary banked hours that were rolled forward to the general committee until after the audit was completed. Yet, again, the Kerry-Edwards Final Audit Report does not include any comments or findings as to how Press reimbursements should have been handled in that type of "cross-election" scenario.

As for Bush-Cheney 2000, it held an aircraft lease with Miami Air International, Inc. that was structured in a manner nearly identical to the Swift Air contract. The Miami Air International contract straddled the primary- and general-election periods, from August 1, 2000 to November 7, 2000, and entitled Bush-Cheney 2000 to a maximum number of flight hours for a fixed payment of \$3,444,312.88. The Bush-Cheney 2000 compliance staff used the same billing methodology for travel under this contract as the Committees did in 2008 with the Swift Air contract. However, the Bush-Cheney 2000 Final Audit Report did not contain an adverse audit finding related to Press travel reimbursements. And the Audit Division did not even

⁴⁰ 11 C.F.R. § 9007.1(a).

⁴¹ Fed. Election Comm'n, Final Audit Report on Kerry-Edwards 2004, et al. at 18 (2007).

⁴² Fed. Election Comm'n, Final Audit Report on Kerry-Edwards 2004, et al. at 21 (2007).

⁴³ Fed. Election Comm'n, Draft Final Audit Report at 18 n. 5 (May 23, 2012).

communicate informally any objection over calculation methodology to Bush-Cheney 2000 compliance staff, many of whom are now involved in the McCain Campaign audit. As the Audit Division put it:

The General Committee also referenced the 2000 Bush-Cheney audit and explained that it used the same billing methodology and personnel in that audit, which did not include an adverse audit finding or any informal advice from the Audit Division suggesting a correction to the accounting methods was necessary. The Audit Division acknowledges that the same billing methodology was used in 2000 Bush-Cheney...⁴⁴

The Division excuses its silence during the Bush-Cheney 2000 audit now by claiming that “the amount of the overbilling of the Press was not material.”⁴⁵ Although the regulated community might well appreciate the Commission saying on the record that a \$40,000 error is immaterial, this statement is highly questionable. The Press reimbursements were hardly minimal—over \$40,000 was sought under the Miami Air International contract during the primary election and the Bush-Cheney campaign incurred over \$200,000 in travel expenses during that same period. Putting aside the amount, though, the Audit Division still should have given notice of methodology errors, even if the Division now somehow considers the amount involved as “not material.” In the context of an audit, the Commission’s acquiescence in a recordkeeping practice has precedential value because silence is reasonably construed by the audited party as approval. This is particularly the case where, as here, the Commission has otherwise failed to issue general guidance concerning a particular recordkeeping practice. Indeed, “if an agency glosses over or swerves from prior precedent without discussion it may cross the line from the tolerably terse to the intolerably mute.”⁴⁶

The Audit Division should not be allowed to “swerve” from prior precedent here. The Primary Committee and the General Committee followed the Commission-audited campaigns’ proven path. Particularly, the Bush-Cheney 2000 method for a fixed-rate contract that straddled primary- and general-election periods was replicated exactly because, again, the same compliance consultants and personnel were involved in the two campaigns. The calculation method used by the Primary Committee and the General Committee is clearly more consistent with the Commission’s audit precedent than the Audit Division’s favored method. The two Committees therefore used a reasonable process to predict the eventual, proper allocation of Press reimbursements between the Committees.

2. The Committees’ Calculation Method Is More Consistent with Generally Accepted Accounting Principles

⁴⁴ Fed. Election Comm’n, Preliminary Audit Report at 11 (Sept. 30, 2011).

⁴⁵ Fed. Election Comm’n, Preliminary Audit Report at 11 (Sept. 30, 2011). *See also* Fed. Election Comm’n, Draft Final Audit Report at 18 (May 23, 2012); Fed. Election Comm’n, Off. of General Counsel Memo. to Thomas Hintermister at 8 (Apr. 11, 2012).

⁴⁶ Bush-Quayle ’92 Primary Comm., Inc. v. Fed. Election Comm’n, 104 F.3d 448, 453 (D.C. Cir. 1997) (citing Greater Boston Tel. Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.).

The Committees' calculation method is based on rules and standards adopted by the accounting profession called Generally Accepted Accounting Principles ("GAAP") that are used to prepare, present, and report financial statements.⁴⁷ The Commission has endorsed GAAP's use in presidential campaign audits and cited GAAP to make an adverse audit finding against the Kerry-Edwards Campaign.⁴⁸

GAAP dictates the use of accrual-basis accounting in nearly all circumstances.⁴⁹ In accrual-basis accounting, revenue is recognized when it is earned and expenses are recognized when incurred. This is in contrast to cash-basis accounting, a non-GAAP method, which records revenue when cash is received and an expense when cash is paid.⁵⁰ Why is accrual-basis accounting a GAAP method and cash-basis accounting not? Because "[i]n many instances, the cash basis just does not present fully enough the financial picture..."⁵¹ After all, the timing of cash receipts and payments may be detached from a transaction's underlying substance.

The Primary Committee and the General Committee used GAAP-compliant accrual-basis accounting to calculate the fixed-expense share of each travel segment's "total actual cost of the transportation." Accrual-basis accounting required that the Swift Air contract expenses (and offsets to those expenses in the form of Press reimbursements) were recognized as actual flight hours were used. A portion of the Swift Air contract's fixed cost was assigned to each travel segment using a depreciation technique called the "units of production" method, which is expressed as $\text{Cost} / \text{Estimated Units} = \text{Depreciation Per Unit Produced}$ (i.e. $\$6,384,000 / \text{Estimated Flight Hours} = \text{Aircraft Hourly Rate}$).⁵² The "units of production" method was most appropriate here because the actual flight hours, and thus the actual contract costs, were not incurred ratably over the individual weeks of the contract.⁵³

⁴⁷ BARRY J. EPSTEIN, RALPH NACH & STEVEN M. BRAGG, WILEY GAAP: 2010 INTERPRETATION AND APPLICATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES 2-4 (2010).

⁴⁸ Fed. Election Comm'n, Final Audit Report on Kerry-Edwards 2004, et al. at 13-14 (2007).

⁴⁹ RICHARD F. LARKIN & MARIE DiTOMMASO, WILEY 2011 NOT-FOR-PROFIT GAAP: INTERPRETATION AND APPLICATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES FOR NOT-FOR-PROFIT ORGANIZATIONS 9, 17 (2011) ("For financial reporting in accordance with generally accepted accounting principles, the accrual basis of accounting must be used.").

⁵⁰ DONALD E. KIESO, JERRY J. WEYGANDT & JERRY D. WARFIELD, INTERMEDIATE ACCOUNTING: PROBLEM SOLVING SURVIVAL GUIDE 3-4 (2011).

⁵¹ RICHARD F. LARKIN & MARIE DiTOMMASO, WILEY 2011 NOT-FOR-PROFIT GAAP: INTERPRETATION AND APPLICATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES FOR NOT-FOR-PROFIT ORGANIZATIONS 14 (2011).

⁵² Depreciation is not a matter of valuation, but a means of cost allocation. The method of depreciation chosen must result in the systematic and rational allocation of the cost of the asset (less its residual value) over the asset's expected useful life. See RICHARD F. LARKIN & MARIE DiTOMMASO, WILEY 2011 NOT-FOR-PROFIT GAAP: INTERPRETATION AND APPLICATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES FOR NOT-FOR-PROFIT ORGANIZATIONS 239 (2011).

⁵³ RICHARD F. LARKIN & MARIE DiTOMMASO, WILEY 2011 NOT-FOR-PROFIT GAAP: INTERPRETATION AND APPLICATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES FOR NOT-FOR-PROFIT ORGANIZATIONS 240 (2011).

By contrast, the Audit Division relied on non-GAAP cash-basis accounting to estimate the fixed-expense share of each travel segment's "total actual cost of the transportation." The "Audit staff used the weekly \$336,000 installment" as the trigger for recording expenses (and offsets to those expenses in the form of Press reimbursements).⁵⁴ Like all cash-basis accounting, this simplifies the hourly rate calculations since one uses only a week's actual flight hours rather than waiting until the end of the contract to determine how many actual flight hours over which to spread the \$6,384,000 fixed fee. But again, like all cash-basis accounting, this does not offer a fully accurate picture of the transaction here because a week's installment payment was *not* paid to Swift Air in exchange for that week's installment of flight hours.

The Audit Division declares, all too conveniently, that "cash or accrual-basis accounting" is not "[t]he issue."⁵⁵ GAAP-compliant methods, in the Audit Division's view, are "[t]he issue" only when candidates fail to use them.⁵⁶ The Audit Division then artfully changes the subject rather than confess that it used non-GAAP accounting:

At issue is whether the activity of a separate reporting and corporate entity (the Primary Committee) should be recognized by the General Committee and by this audit. An underlying assumption to GAAP is that every entity is separate and, therefore, the revenue and expenses of each entity should be recognized as such.⁵⁷

Again, this "corporate separateness" statement does not validate the Audit Division's reliance on cash-basis accounting—just because one treats corporations as separate entities does not mean one should arbitrarily use weekly installment payments as the basis for calculating a travel segment's "total actual cost."

The Audit Division's point about corporate separateness instead seems to be that the Division must bisect the Swift Air contract and entirely disregard its primary-election portion.⁵⁸ This is, again, counterfactual. The Primary Committee and the General Committee are separate for Commission reporting purposes and only the General Committee is subject to mandatory audit, but they are otherwise tightly integrated entities, having shared a candidate, staff members,

⁵⁴ Fed. Election Comm'n, Preliminary Audit Report at 10 (Sept. 30, 2011).

⁵⁵ Fed. Election Comm'n, Preliminary Audit Report at 10 (Sept. 30, 2011).

⁵⁶ See Fed. Election Comm'n, Final Audit Report on Kerry-Edwards 2004, et al. at 13-14 (2007).

⁵⁷ Fed. Election Comm'n, Preliminary Audit Report at 10 (Sept. 30, 2011).

⁵⁸ Interestingly, in the Kerry-Edwards Final Audit Report, the Audit Division quotes the Wiley GAAP 2007 Interpretation and Application of Generally Accepted Accounting Principles textbook stating, "costs that are capitalized upon acquisition are any reasonable cost involved in bringing the asset to the buyer and incurred prior to using the asset." The reason the Audit Division includes this section is to later make its point that part of the reconfiguration costs paid by the Primary Committee are really owed by the General Committee. The General Committee notes this passage because the Audit Division states that it is permissible to bridge committees and use GAAP principles in an instance when reconfiguration costs for travel purposes are a capital asset that must be calculated and paid for by the General Committee, even though the checks were originally written during the Primary Committee. Having interpreted GAAP previously as requiring a "cross-election" inquiry, it is puzzling how the Audit Division now makes the opposite claim. Fed. Election Comm'n, Final Audit Report on Kerry-Edwards 2004, et al. at 13-19 (2007).

consultants, the Swift Air contract, and other resources.⁵⁹ The Audit Division suggests GAAP mandates its proposed suspension of reslity, but that suggestion is incorrect. In fact, GAAP provides for separate commonly controlled organizations that share an economic interest, like the Primary Committee and the General Committee, to issue consolidated financial figures.⁶⁰ And GAAP's "matching principle" counsels against bisecting the Swift Air contract, as it requires the cost of a long-lived asset to be allocated over all of the accounting periods during which the asset is used (i.e. the entire contract period).⁶¹

In sum, the calculation method used by the Primary Committee and the General Committee is more consistent with GAAP. The two Committees therefore used a reasonable process to predict the eventual, proper allocation of Press reimbursements between the Committees.

B. To the Extent a Misallocation of Press Reimbursements between the Committees Still Exists, the General Committee May Correct the Imbalance through a Payment to the Primary Committee

The General Committee believes that, to the extent a misallocation of Press reimbursements between the General Committee and the Primary Committee still exists, the General Committee may correct the imbalance through a payment to the Primary Committee.

Materials included with the Draft FAR miscast the issue as whether "the General Committee owes the excess press reimbursements it received to the Primary Committee."⁶² This is inaccurate. The actual issue is more general in nature: do Commission rules and precedents prohibit the General Committee from correcting a Press reimbursement misallocation through a payment to the Primary Committee?

As an initial matter, it is worth noting that the Audit Division is making two inconsistent arguments. On one hand, the Division states that the Press reimbursements received by the General Committee are excessive because the travel costs and associated receipts are attributable to the primary election:

The Audit Division's method indicates that the General Committee billed the press and received reimbursements from the press ... for a portion of the travel costs that the

⁵⁹ 11 C.F.R. § 9007.1(a).

⁶⁰ RICHARD F. LARKIN & MARIE DITOMMASO, WILEY 2011 NOT-FOR-PROFIT GAAP: INTERPRETATION AND APPLICATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES FOR NOT-FOR-PROFIT ORGANIZATIONS 160 (2011).

⁶¹ See PATRICK R. DELANEY, RALPH NACH, BARRY J. EPSTEIN & SUSAN W. BUDAK, WILEY GAAP 2003: INTERPRETATION AND APPLICATION OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES 66 (2003).

⁶² Fed. Election Comm'n, Off. of General Counsel Memo. to Thomas Hintermister at 9-10 (Apr. 11, 2012).

Primary Committee paid to Swift Air for primary campaign transportation attributable to the primary campaign.⁶³

On the other hand, the Audit Division asserts that these primary-election Press reimbursements cannot be given now to the Primary Committee because they have also become general-election Press reimbursements and disbursing them to “the Primary Committee ... would be considered a non-qualified campaign expense subject to repayment.”⁶⁴ It is not apparent how a single set of Press reimbursements can simultaneously be both primary- and general-election reimbursements. The Audit Division’s argument is not just self-contradictory, though. The Audit Division is wrong for several other reasons.

First, the Audit Division cites the “qualified campaign expense” definition for the proposition that “regulations state that a general election committee cannot incur primary-related expenses because they are not in furtherance of the general election.”⁶⁵ This is a misstatement of the law. Primary-election expenses do indeed fall outside the “qualified campaign expense” definition. But not all funds received by a general-election candidate committee must be spent only for a “qualified campaign expense.” Commission rules are precise: “An eligible candidate shall use payments received under 11 CFR part 9005 only ... [t]o defray qualified campaign expenses...”⁶⁶ Funds not “received under” Part 9005 (concerning the general-election public grant) are not similarly constrained. It may be that the use of general-election Press reimbursements are restricted, since they offset the initial outlay of fund “received under” Part 9005.⁶⁷ But the Audit Division makes no attempt to explain how Press reimbursements “attributable to the *primary* campaign,” as described in the Draft FAR materials, are “received under 11 CFR part 9005.” Indeed, these primary-election Press reimbursements, which offset an initial outlay of privately raised funds by the Primary Committee, are simply not comparable to public funds received by the General Committee as a general-election grant under Part 9005. They are therefore not subject to the “qualified campaign expense” restriction.

Second, the Audit Division never explains how the General Committee’s transfer to the Primary Committee would be an “expense” at all—qualified or non-qualified. The General Committee and the Primary Committee are “affiliated.”⁶⁸ For contribution limit purposes, affiliated committees are “considered ... a single political committee” and transfers between them are unlimited by typical restraints on movement of funds.⁶⁹ The General-to-Primary transfer itself would therefore not be an “expense.” Now, the Audit Division may counter that

⁶³ Fed. Election Comm’n, Off. of General Counsel Memo. to Thomas Hintermister at 5 (Apr. 11, 2012).

⁶⁴ Fed. Election Comm’n, Preliminary Audit Report at 13 (Sept. 30, 2011).

⁶⁵ Fed. Election Comm’n, Preliminary Audit Report at 13 (Sept. 30, 2011).

⁶⁶ 11 C.F.R. § 9004.4(a)(1).

⁶⁷ Fed. Election Comm’n, Off. of General Counsel Memo. to Thomas Hintermister at 10 (Apr. 11, 2012) (“Because press payments reimburse campaigns for some of the public funds spent on travel costs, reimbursements retain their character as public funds.”).

⁶⁸ 11 C.F.R. § 100.5(g).

⁶⁹ 11 C.F.R. § 110.3(a)(1), (c).

the "expense" refers to the Primary Committee's outlay for Press travel. This is also incorrect. The Primary Committee, according to the Audit Division, already paid for Press travel without recouping its full costs.⁷⁰ Given that it is nearly four years after the 2008 election, funds transferred to the Primary Committee will likely sit in the Primary Committee's bank account without actually defraying any primary-election activity's costs. In other words, the General Committee will not actually incur any primary-related expenses. The transfer is simply to correct what should be seen as the original "misdeposit" of primary-election Press reimbursements into a General Committee account.

Third, the transfer would not be a "non-qualified expense" because the Commission has in the past repeatedly permitted transfers from publicly funded general-election committees to their affiliated primary-election committees to correct misallocations and similar issues. For example, the Commission required the Kerry-Edwards Campaign's general-election committee to pay the Campaign's primary-election committee to fix a misallocation of joint reconfiguration costs and banked flight hours.⁷¹ The Audit Division admits these types of payments have been relatively common:

The Audit staff acknowledges that transfers were sometimes permitted between the primary and general committees in Presidential campaign when it has been shown in the course of an audit that funds or obligations belonging to a primary or general committee were in the possession of the other. This is not the case in this instance.⁷²

The Audit Division never explains why it "is not the case in this instance," offering only a bald declaration. But if the standard is, as the Audit Division states, that transfers are permitted "when it has been shown ... that funds or obligations belonging to a primary or general committee were in the possession of the other," those circumstances are certainly present here. The Draft FAR materials, in fact, conclude that the General Committee "received reimbursements from the press ... for a portion of the travel costs that the Primary Committee paid to Swift Air for primary campaign transportation..."⁷³ Said differently, funds "belonging to [the Primary Committee] ... were in the possession of the" General Committee. The General Committee is, according to the Audit Division, receiving another "free ride" at the Primary Committee's expense. The Primary Committee's Press cost-to-reimbursement balance is negative, while the General Committee's is positive. The General Committee should be allowed, as other committees have been, to transfer funds to reach a cost-benefit equilibrium for both Committees because this situation meets the very standard articulated by the Audit Division.

And finally, a General-to-Primary transfer should not be prevented under the Audit Division's "non-qualified expense" rationale because the only reason for this misallocation issue is the Commission's failure to provide guidance on how to prospectively calculate the fixed-cost

⁷⁰ Fed. Election Comm'n, Preliminary Audit Report at 13 (Sept. 30, 2011) ("The Primary Committee appears to have billed an amount that was less than its cost.")

⁷¹ Fed. Election Comm'n, Final Audit Report on Kerry-Edwards 2004, et al. at 19-22 (2007).

⁷² Fed. Election Comm'n, Draft Final Audit Report at 19 (May 23, 2012).

⁷³ Fed. Election Comm'n, Off. of General Counsel Memo. to Thomas Hintermister at 5 (Apr. 11, 2012).

portion of a particular travel segment's "total actual cost of ... transportation." The Primary Committee and the General Committee had no notice that they were not using the Commission's preferred calculation method. In fact, the Commission's past acquiescence during the 2000 election cycle led directly to the Primary Committee and the General Committee using the cost calculation method that they did, adjusting each new travel segment's hourly costs based on the evolving total of estimated hours to be flown under the Swift Air contract. This was a reasonable method in light of the Commission's silence and apparently misleading acquiescence, and the General Committee should not be penalized through a forced refund to Press entities. The Commission should permit the transfer here, even if it decides not to do so for future committees, who now understand the Commission's preferred calculation method under these circumstances.

In sum, the General Committee asserts that to the extent a misallocation of Press reimbursements between the General Committee and the Primary Committee still exists, the General Committee may correct the imbalance through a payment to the Primary Committee. The Audit Division claims this is legally prohibited because the transfer would be a "non-qualified campaign expense." The Audit Division's claim is undermined, however, by the text of Commission rules, the "affiliated" status of the General and Primary Committees, the Commission's practice of allowing transfers to correct misallocation-like issues, and the Commission's failure to provide advance guidance on Press reimbursement calculations. We respectfully request that the Commission permit the transfer from the General Committee to the Primary Committee to resolve any lingering misallocation of Press reimbursements between them.

In the event the Commission somehow does not permit the transfer, the General Committee asks that it be allowed to disgorge the Press reimbursements to the U.S. Treasury, as has been permitted previously.⁷⁴ Over 200 travel segments involving 700 press entities occurred during the primary- and general-election periods. Reconstructing the proper refund amounts for each Press representative would be exceedingly burdensome. And the General Committee would be compelled to remain open for an inordinate amount of time to await the clearance of any stale-dated refund checks.

⁷⁴ Fed. Election Comm'n, Final Audit Report on the Mondale-Ferraro Committee at 23 (1987) ("The Interim Audit Report included an amount for accounts payable due the Press of \$32,381.36 which represented amounts collected from the Press for air charters and incidentals which were in excess of amounts billed. The figure was as of March 31, 1985. The General Fund's response, verified by follow-up fieldwork, indicates that after March 31, 1985 an additional \$927.40 was received. Therefore, accounts payable due the Press has been increased to \$33,308.76. General Fund officials intend to research these prior to making any refunds. A review of the General Fund's disclosure reports through September 30, 1986 show that none of these refunds have been made. *If it is determined that the refunds will not be made, the amount of the surplus repayment [to the US Treasury assumed to be also for other items and their receipt of the federal grant] should be adjusted accordingly.*") (emphasis added).

II. CONCLUSION

For all the foregoing reasons, McCain-Palin 2008 and McCain-Palin Compliance Fund believe the Final Audit Report should state that the Commission found no legal violations and that the two committees may terminate their registrations with the Commission immediately.

Respectfully Submitted,

(signed)

Salvatore A. Purpura

Assistant Treasurer

McCain-Palin 2008 and McCain-Palin Compliance Fund